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In The

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-616

GULF OIL CORPORATION,

Petitioner

v.

KENNETH LEHRMAN,

Respondent

REPLY TO PETITION OF GULF OIL CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Supreme Court Of The United States:

Respondent Kenneth Lehrman presents this reply to petition by Gulf Oil Corporation for a writ of certiorari to review judgment of the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

None of the considerations specified in Supreme Court Rule 19 are present, and the Court should not accept jurisdiction of this case.

QUESTIONS PRESENTED

Respondent does not take exception to the statement of the questions presented, except to the extent that

questions (a) and (b) tend to inaptly characterize the pricing system employed by Gulf Oil Corporation. Reference is made, therefore, to the opinion of the Fifth Circuit Court of Appeals, to the discussion contained in this reply, and to the record, for a better description of Gulf's actual practices.

STATEMENT

Petitioner's statement of the case fails to properly describe Gulf's pricing system, both with respect to its general application throughout Gulf's distribution system, and as particularly related to this case. Additional statement is also needed with regard to the allegations that the Court received improper evidence, and with regard to the allegations concerning damages.

Gulf's Pricing System [Questions (a) and (b)]:

Kenneth Lehrman operated a Gulf branded service station in Mart, Texas, from November 8, 1959 until October 17, 1967. The station property was leased from Gulf's area distributor. Lehrman's lease and his contracts with Gulf for purchase of gasoline were annually renewable. Tr. 27. Lehrman's gasoline sales increased from a monthly average of 7,000 gallons in 1959 to a monthly average of 11,000 gallons in 1964, with a high of approximately 15,000 gallons in one month. After 1964, gallonage steadily declined until Lehrman went out of business in 1967. Tr. 28

Lehrman was told by the Gulf distributor or by Gulf employees working in Gulf's district office in Tyler, Texas, the price to post on gasoline he sold. Tr. 29.

The procedure by which pump prices were posted never changed. Lehrman was told the price to post during the entire period that he was at the station. The mechanics were the same even though for a period of time Lehrman was on "consignment contract" in which Gulf reserved the right to tell Lehrman the price to post. Tr. 189, Exhibit 27; Tr. 232; Tr. 113-114. The consignment contract was abandoned by Gulf apparently in response to *Simpson v. Union Oil*, 377 U.S. 13.

Lehrman's station was in direct competition with stations located in Waco, a city approximately 17 miles away. Tr. 77. A large part of the working population of Mart worked in Waco. Tr. 81-82. Retail prices in Waco had a direct effect upon gasoline sales in Mart. Tr. 118; Tr. 297; Tr. 491; Tr. 500. Waco prices were consistently below Mart's prices, at times as much as ten cents, during the period 1959-1967. Tr. 33, 118, 297, 491, 500.

For a while in 1964, Lehrman was competitive with Waco prices, due to the fact that a "Save" self-service station entered business in Mart in latter 1963. According to Mr. Lehrman (Tr. 35):

> "Well, the Save station, when it came in, he started out trying to stay with Waco prices. He opened up at 20.9, I believe, and then during the year 1964 Gulf would let me stay within one cent of him with my Gulftane gasoline."

Thus, by enabling Lehrman to stay close to the Waco price, the Save station was a direct benefit even though

it posted a penny below Lehrman's price on Gulftane. In fact, on certain occasions, Lehrman posted prices, not directly authorized by Gulf, which were even with or below that being posted by the Save station, in an attempt to "short-cut" the price reduction mechanics. Lehrman's action would cause the Save station to drop its price even further, and then Lehrman would report the lower price and secure further price reduction authorization. He did this, he testified, to get his price as low as it could be authorized by Gulf at the Tyler district level, i.e., 21.9 on Gulftane, at which point the Save station would be posting 20.9. In this manner, Lehrman achieved a fairly competitive position with Waco stations and "Harrison Switch" stations, (located approximately eight miles from Mart on the Waco road) which were also allowed to post Waco prices.

This changed in early 1965. Mr. Durst, a Cape Oil representative, called Mr. Stokes, Gulf's district manager in Tyler, and complained that Lehrman was posting Gulftane within a penny of the Save station's price. Tr. 37, 299, 209. The avowed purpose of this call was to get Gulf to cause Lehrman to raise his prices. Tr. 318. This was accomplished within a week after the telephone call. Tr. 321. Lehrman was told by a Gulf representative that he "couldn't be trusted". Tr. 40. Lehrman's "price support" was taken away by Gulf, forcing Lehrman to post a higher, non-competitive price. This was in accordance with the "policy" of Gulf, according to Mr. Stokes, to "support" a retail posting by a Gulf dealer within two cents of a self-serve station. Tr. 194-195, 428.

After this, Lehrman received no further price support, and at all times posted a price dictated by Gulf's representative. He repeatedly requested price support, and even made a trip to Tyler to secure it, to no avail. Thus, the two cent advantage of the Save station, and the consistently lower Waco prices, had a direct effect upon Lehrman's ability to sell gasoline. (After 1964, the Save station did not stay close to the Waco price, but generally stayed two or three cents above it.)

The situation worsened until it drove Lehrman from business. As stated by Mr. Lehrman (Tr. 125):

"Q. Mr. Lehrman, why did you close your station?

A. I just finally got down to the end of it, where I didn't think I could make it.

Q. Had you borrowed money to keep it alive, to try to run it?

A. Yes, sir.

Q. Are you still paying off some of that money today?

A. Yes, sir.

Q. You couldn't make a living, you say?

A. Yes, sir.

Q. Why couldn't you?

A. You've got to be able to sell gas to make it, and to get the people in there, and I couldn't sell it, not at those prices."

The mechanics of Gulf's pricing system were more completely described by Gulf employees.

Gulf has a "tank wagon price" that is charged to dealers. Off this price, Gulf gives a discount or "temporary competitive allowance," referred to as a "TCA". Tr. 165-166[1]

The dealer is allowed a certain gross profit margin on each gallon of gasoline, ranging from 4.5 cents to 5 cents per gallon, *assuming* that the dealer posts the retail price which corresponds to the TCA in effect. If a dealer needs "price support", it must be requested from Gulf, and Gulf must verify "competitive postings", i.e., those of the "dominant" competition, or "major competitors", meaning other major oil companies in the area. Tr. 178. (This excludes private brands.) One Gulf representative testified that in order to verify what "dominant competition" was doing, someone with Gulf simply called whoever was "responsible for pricing" in the competitor-company. Another Gulf representative said that this practice has been discontinued.

The "dominant competition" is considered within a certain geographical area, referred to as a "trade area". Gulf determines the trade area, and which stations are to be included in it. Tr. 181, 182.

If a requested price is determined to be competitive with "dominant competition", Gulf favorably considers

1. Remarkably, Mr. Stokes, former Tyler district manager and director of "reseller" sales of Gulf, who had been familiar with the pricing structure of Gulf for many years, was not able to give the prevailing tank wagon price. This illustrates the mechanical subterfuge aspect of the pricing system.

the granting of the allowance, and the TCA is deducted from "dealer's tank wagon", to determine the price to the dealer. Thus "normal tank wagon price" is an arbitrary figure, for it is rarely in effect. (This accounts for the fact that Mr. Stokes did not even know what it was.)

After a TCA is granted, a Gulf employee informs the dealer, according to testimony by Gulf, "you have an allowance of so much, and Gulf is supporting a price of so much." Tr. 183[2]. TCA's changed in the Waco trade area quite often during the period that Lehrman operated the Mart station. Gulf granted TCA's on a daily basis much of the time. Tr. 182, 183.

Thus, Gulf determines competitive pricing, trade areas, and whether a competitive allowance is warranted. If a dealer lowers the pump price without authorization, he does not get corresponding price support, and therefore reduces the gross margin that he makes on each gallon of gasoline. Likewise, if he increases the posted price without authorization, he will inevitably be posting higher than "dominant competition", and therefore will lose business. In this manner, the dealer

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2. There is a variance in testimony between Mr. Lehrman and other Gulf dealers who testified, and the Gulf representatives on this point. The dealers testified that they were directly told the price to post. Even so, accepting Gulf's testimony, the system is one which is obviously designed to secure and maintain retail price adherence, and which accomplishes the result.

In this connection, Gulf representatives did recognize that for a period of time Gulf sent Lehrman certain forms telling him that "effective on (a specified date) the retail price of gasoline will be (a specified price). Please be guided accordingly." (Tr. 187, 188) This form was used while Lehrman was on the "consignment arrangement."

is "bracketed in", with the natural result that he posts the retail price desired by Gulf.

Superimposed on this arrangement are the Gulf "policies" of posting within one cent of a "private brander" who has a "conventional station", within two cents of the "self-serve station", and supporting the posting of a price which is the same as "dominant major competition".

Furthermore, the system is employed within the framework of a dominor-dominee relationship, whereby Gulf is the dealer's landlord, supplier, and banker, to the extent that Gulf affords certain dealer credits, Tr. 223, a situation common throughout the Gulf retail distribution system.

Lehrman directly testified, Tr. 158, 159, that Gulf told him the price to post, and that he ". . . never posted anything except the one time that they didn't tell me to post it." The one time to which he has reference was the "shortcut" system of getting Mart prices competitive with Waco prices, which resulted in Lehrman being deprived of price support.

Mr. Duane McDonald, another Gulf service station dealer, verified Mr. Lehrman's version of the actual instructions received from Gulf, as did Mr. G. B. McDonald, who had worked at several different Gulf stations. Tr. 263, et.seq.

Stokes, the Gulf representative, admitted that as a result of Durst's phone call, he found that he had been "giving" Lehrman a price support on Gulftane within

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a penny of the self-serve station, and realized "this was a mistake" so he started "giving" Lehrman support within two cents of the self-serve station, in accord with the policy "throughout the district" and "throughout the industry." Tr. 193, 196.

This system is employed by Gulf throughout the United States. Gulf sells gasoline through 33,000-34,-000 so-called "assured outlets", that is, stations where Gulf owns the property, or leases it under long term lease, thus giving Gulf guaranteed outlets throughout the 48 continental United States. Gulf sold 551,000,000 gallons of gasoline in Texas in 1965, and 583,000,000 gallons in 1966. Total industry sales in Texas in 1965 were 4,526,000,000 and in 1966 they were 4,744,000,-000. In 1965, Gulf sold 4,951,000,000 gallons of gasoline in the United States, and in 1966, it sold 5,285,-000,000. Total industry sales in 1965 were 70,404,-000,000 and in 1966 the industry sold 73,706,000,000. Gulf sells to its stations about seven or eight percent of all gasoline sold at retail in the United States. It is in the top five of the major oil companies. It is continuously engaged in interstate commerce and in international commerce. Tr. 384, et.seq.

One thing remains to be mentioned. Gulf refers in its application to two stipulations, i.e., that Mr. Lehrman "voluntarily" surrendered his station, and that Lehrman's competitors were confined to Mart and Harrison Switch and he lost no business to any other Gulf stations. This, of course, is at variance with the direct testimony, as revealed by the record. It is true

that a pretrial order was filed which contained fact stipulations along these general lines. However, these fact stipulations were withdrawn by letter filed with the trial court the day after the filing of the pretrial order. This matter was brought to the attention of the trial court at the earliest opportunity and, prior to commencement of trial, the Court informed all counsel that neither party would be held to a fact stipulation inadvertently made, or which the evidence would not support. It is the evidence in the record (which the jury heard and upon which the verdict was based) that is controlling.

No Improper Evidence Was Admitted [Question (c)]

There was direct testimony that Gulf stations in Waco, in addition to other major stations in Harrison Switch, consistently posted prices lower than those allowed to be posted in Mart. Lehrman lost gasoline sales to stations at both places. This testimony was clearly admissible, without reference to price discrimination. Certainly, a price discrimination case was clearly apparent *except* for the general jurisdictional requirements, under Robinson-Patman, that at least one of the discriminatory saies must occur "in commerce". It was for this reason that no Robinson-Patman violation was alleged, but this does not mean that the practice can not evidence a violation of the Sherman Act.

The testimony of the other Gulf dealers was in response to Gulf's contention that the Gulf dealers are free to set any price which they desire. Gulf representatives testified that their system applies uniformly,

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and is administered in basically the same manner throughout its distribution system. Therefore, testimony showing the actual practices of Gulf were clearly admissible, regardless of the location wherein such practices occurred. (In this case, the practices were in an adjoining district.)

The Damage Testimony Was Properly Admitted, And Sustained The Jury's Verdict. [Question (d)]

Despite the fact that the Fifth Circuit has reversed this case for retrial on the issue of damages, Gulf again complains of the method of proof of damages.

The complete evidentiary picture of Lehrman's profits, expense items, sales, etc., was presented to the jury. There was likewise presented the "yardstick" of a comparable Gulf station which, at the time the comparison was made, was selling approximately 30,000 gallons per month in a location that was within a reasonably nearby vicinity. The expense figures, and gross profit figures, of the two stations were compared and found to be virtually identical. In fact, Gulf's only criticisms are that the "yardstick" did not include an interest expense which, for Lehrman, amounted to $456 for the year 1964, and did not include cash shortages shown to be deducted from Lehrman's tax returns for the years 1965, 1966, and 1967, which were of a minor amount. It is obvious that these differences are inconsequential, and affect only the weight of the evidence.

Based upon the "yardstick" as directly compared to Lehrman's operations, projections were made of lost

profits based upon sales of 15,000, 20,000, 30,000 and 40,000 gallons per month. These, of course, were simple mathematical computations. All testimony was to the effect that basic expenses would remain approximately the same, even though sales volume increased, because the same basic overhead would be required whether selling 5,000 or 50,000 gallons of gasoline per month.

There was testimony from Lehrman (based upon his experience and direct observations), Durst, the sales representative of Cape Oil Company (based upon his experience and direct observations), and C. C. Jones, a Mart Humble dealer (based upon his direct experience and observations), supporting the proposition that sales of 20,000 to 30,000 gallons of gasoline per month at Lehrman's station would in all reasonable probability have been achieved had the station been able to post prices that were competitive.

Lost profits (on the basis of the different sales volume figures) were projected over a ten-year period, which, according to 5-A Corbin, *Contracts*, Sec. 1024 (1964) is a reasonable period. See also the discussion in Volume 80, *Harvard Law Review*, p. 1566 and p. 1577. (Lehrman was operating the station for three and one-half years during the four-year limitation period prior to instituting suit.)

The jury returned a verdict of $60,000 actual damages. In doing so, the foreman announced that this was to cover "the ten-year period". When so considered, the damages awarded were less than the maximum

profits that Appellee could have made upon sales of only 15,000 gallons per month, a point that he had reached shortly before Gulf took the punitive action of denying him further price support.

REASONS FOR REFUSING THE WRIT.

(a) *Gulf's illegal pricing system "involves" and "affects" commerce.*

The applicable test is stated in *Simpson v. Union Oil,* 377 U.S. 13, 12 L.Ed.2d 98, 84 S.Ct. 1051, in the following quotation:

> "There is actionable wrong whenever the *restraint of trade or monopolistic practice* has an impact on the market; *and it matters not that the complainant may be only one merchant.*" (emphasis supplied)

Thus it is the *practice* pursuant to which damaging action is taken that must be considered. If the law were otherwise, price-fixing arrangements of a nationwide scope could be defended, in every instance, simply by requiring the court to view them piecemeal. The lower court's opinion, and the authorities cited therein, clearly demonstrate that this proposition cannot be sustained. See *Simpson* v. *Union Oil Co.*, 377 U.S. 13; *Standard Oil* v. *U.S.* 337 U.S. 293; *U.S.* v. *Richfield*, 99 F.Supp. 280, aff'd per curiam, 343 U.S. 922; and *Osborn* v. *Sinclair*, 324 F.2d 566.

It is also clear that jurisdiction exists even if the case is considered from the individual retailer, i.e., Lehrman's standpoint. This is likewise made abundantly clear by the discussion in the lower court's opinion, and needs no further annotation or elaboration.

The cases cited by Gulf are not on point. *Borden Company v. Federal Trade Commission*, 339 F.2d 953, involved a milk price-discrimination case. The court's opinion demonstrated the differences between Robinson-Patman and Sherman Act commerce tests. *Page v. Work*, 290 F.2d 323, dealt with the market for legal news advertising in Los Angeles County, a wholly intrastate market. The opinion recognizes the principle that a price-fixing conspiracy, or other *per se* violation, which operated on or within the flow of interstate commerce, affects said commerce as a matter of law. *Lieberthal v. North County Lanes, Inc.*, 332 F.2d. 269, involved an allegation of a conspiracy to stop construction of a bowling alley in Plattsburg, New York. *Las Vegas Merchants Plumbers Association v. United States*, 210 F.2d 732, upheld a finding of a jury convicting defendants of criminal conspiracy, though all the plumbers' activities were intrastate. *Mitchell v. Livingston & Thebault Oil Company*, 256 F.2d. 757, was a labor relations case which determined that certain owners and lessees of service stations were not subject to overtime and record-keeping provisions of the Fair Labor Standards Act. It has no application to this case. *Belliston v. Texaco, Incorporated*, 455 F.2d 175, is equally inapplicable.

(b) *The jury's verdict and the trial court's judgment were abundantly supported by evidence.*

The jury obviously had sufficient evidence upon which to base its decision with regard to liability. The trial court properly charged the jury, and the jury had

more than sufficient evidence to sustain their decision. This is made clear by the lower court's opinion. Damages are discussed under sub-heading (d), *infra.*

(c) The evidence of other Gulf dealers' testimony and Waco prices was properly admitted.

The testimony of the Gulf dealers was probative and relevant. It helped to establish and illustrate the price-fixing system employed by Gulf. In connection with Gulf's statement that the testimony was admitted for harassment purposes, it should be noted that the trial court, pursuant to Gulf's objections, limited testimony from the McDonalds regarding harassment by Gulf because there was no testimony of a direct statement by Gulf that the harassment was due to to the McDonalds' failure to comply with Gulf's pricing policies.

The testimony concerning the Waco prices obviously was admissible, since it was directly shown that Lehrman lost business to the Waco stations. These propositions are fully covered by the lower court's opinion.

(d) *The judgment as to damages was well supported by evidence, as was the jury's verdict, which should be re-instated.*

The subject of damages for destruction of all or a part of a business in a private treble damage antitrust suit is comprehensively reviewed in an article appearing in Volume 80, *Harvard Law Review,* p. 1566, et.seq. There it is pointed out that there are two primary measures of damages which have been sanctioned. The first, and most commonly used, is that of lost profits. The second, generally used as an alternative, is loss of market value. Lehrman chose to prove lost profits. In

doing so, he was unable to rely upon the "before and after" theory, because his business was in a formative stage during the years in which it showed a profit and was never free from the "impact" of the violation involved, except possibly in the year 1964 (in which year the station's potential was demonstrated). Therefore, he pursued a second method of proof characterized in the *Harvard Law Review* article as the "yardstick" test.[3].

The jury returned a verdict of $60,000 actual damages. When considered over the ten-year period of projection, the damages were less than the minimum profit that Appellee could have made upon sales of only 15,000 gallons per month, a point that he had reached shortly before Gulf took the punitive action of denying him further price support.

Thus, contrary to Gulf's assertions, the testimony not only abundantly supports the judgment (in which the Court ordered remittitur of damages), but supports the entire amount of actual damages awarded by the jury, and this Court should remand with directions that the trial court enter judgment based upon the jury's verdict.

The landmark case concerning proof of damages in an antitrust action is *Bigelow v. R.K.O. Radio Pictures*, 90 L.Ed. 652, 327 U.S. 251, 66 S.Ct. 574 (1945). The principles enunciated therein are directly applicable to

3. To a degree, he used the two theories together, because he did present a complete evidentiary picture of his profits, expense items, sales, etc. There was likewise presented the "yardstick" of a comparable Gulf station.

the case at hand, as are those espoused by *Storey Parchments v. Patterson,* 282 U.S. 555. These principles have been consistently followed in both antitrust and non-antitrust cases involving recovery of future lost profits. See *Entis v. Atlantic Wire & Cable Corporation,* 335 F.2d 759; *Locke v. U.S.* 283 F.2d 521; *Lessig v. Tidewater Oil Company,* 327 F.2d 459, *Obitron Corporation v. General Motors Corporation,* 295 F.Supp. 373, and other cases cited in the lower court's opinions.

Gulf argues that Lehrman's projection was actually a projection of future lost profits, and therefore the Court could not apply them to the three and one-half years that Lehrman was in the station (during the limitations period) without subtracting the small amount of net profits which Plaintiff realized during such period, and without giving consideration to the fact that Lehrman testified that he had "no complaints" during the year 1964. These arguments are without merit. Once the fact of damages has been established, all that need be shown is some basis for a just and reasonable estimate of the amount. The proof shows that had Lehrman been allowed to post competitive prices he could have sold far above the 15,000 gallons per month which he achieved in 1964. The jury awarded damages in an amount which was less than the net profit on sales of 15,000 gallons a month. Thus, any offset or allowance due Gulf for realized profits or attributable to the brief competitive situation that existed while Lehrman was in business, were adequately compensated by the jury's verdict. Gulf's arguments

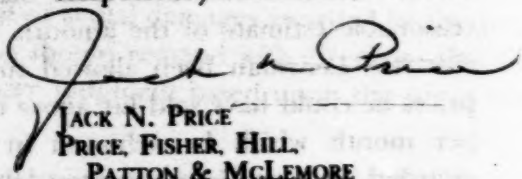
concern the weight and not the propriety of the evidence supporting the verdict.

The Circuit Court of Appeals notes that the trial court was in error in ordering remittitur, but reverses on the issue of damages because of an asserted error in the Court's charge. It is submitted that the alleged error in the charge is inconsequential and has no effect upon the amount of damages awarded. Accordingly, the proper judgment that should be entered is one remanding to the trial court with instructions to reinstate and enter judgment for the Respondent in the amount of the jury's verdict.

CONCLUSION

For the reasons set forth above, this Honorable Court should refuse the issuance of a writ of certiorari and should remand to the trial court with instructions to reinstate the jury's verdict and enter judgment thereon for Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, JACK N. PRICE, hereby certify that a correct copy of the foregoing Reply to Petition of Gulf Oil Corporation For Writ of Certiorari was served on counsel for Gulf Oil Corporation, Mr. William F. Erwin, Jr., and W. B. Edwards, P. O. Box 2100, Houston, Texas, by depositing a copy of the same, postage prepaid, in the United States mail this 16 day of November, 1972.

Jack N. Price